Supreme Court, U. S.
FILED
JAN 14 1974
MICHAEL RODAK, JR., CLERK

No. 73-1106

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM COUSINS, ET AL.,

Petitioners,

vs.

PAUL T. WIGODA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

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PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

This case arises out of the contest between petitioners and respondents over which competing delegation should be seated to represent the Chicago districts at the 1972 Democratic National Convention which opened in Miami, Florida on Monday, July 10, 1972. This credentials contest was the subject of this Court's decision in *Keane* v. *National Democratic Party*, 409 U.S. 1 (1972) (considered together with the case involving the California credentials contest and decided *sub nom. O'Brien* v. *Brown*) (included

as Appendix A hereto), announced at a special term on the evening of Friday, July 7, 1972.

This Court determined to stay the judgments of the United States Court of Appeals for the District of Columbia in both the Chicago and California cases so that the Democratic National Convention could exercise its historical right "to accept or reject, or accept with modification, the proposals of its Credentials Committee." This Court stated in its *per curiam* opinion that "it has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated" and this Court emphasized "the large public interest in allowing the political processes to function free from judicial supervision."

Petitioners (the alternative Chicago delegates seated by the Credentials Committee and subsequently by the Convention itself) submit that the July 7 decision of this Court established conclusively that, in the particular circumstances of this case, the Democratic National Convention—and not the courts—was to decide the Chicago credentials contest.

This contest now comes before this Court again because, notwithstanding the July 7 decision of this Court, on the next evening, July 8, 1972, respondents (the unseated Chicago delegates who had themselves instituted the action which resulted in this Court's decision) sought and obtained from the Circuit Court of Cook County an injunction purporting to bar petitioners from participating in the Democratic National Convention. Subsequent to the Convention, the Circuit Court of Cook County, on motion of respondents, has commenced con-

tempt proceedings in which petitioners are threatened with fines or jail sentences for participation in the Democratic National Convention in alleged violation of the Circuit Court's injunction. In addition, on August 2, 1972, the Circuit Court of Cook County issued a supplemental order enjoining petitioners from participating in the selection of members of the Democratic National Committee from Illinois. The orders of the Circuit Court of Cook County were upheld on appeal by the Illinois Appellate Court (First District) and the Illinois Supreme Court declined to review the judgment of the Appellate Court.

Petitioners respectfully pray that this Court grant a writ of certiorari to the Illinois Appellate Court and summarily reverse the judgment below on the authority of *Keane* v. *National Democratic Party* or, in the alternative, review the substantial Federal questions raised by the judgment below.

OPINION BELOW

The opinion of the Illinois Appellate Court, reported at 14 Ill. App.3rd 460, 302 N.E.2d 614 (1973), is included as Appendix B hereto.

JURISDICTION

The opinion and judgment of the Illinois Appellate Court were entered on September 12, 1973. On November 29, 1973, the Supreme Court of Illinois denied, without opinion, petitioners' timely motion for leave to appeal to that court the decision of the Illinois Appellate Court (Appendix K). No further review in the Illinois courts can be had.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the injunctions issued by the Circuit Court of Cook County against participation by petitioners as delegates in the 1972 Democratic National Convention were barred by the prior decision of this Court in *Keane* v. *National Democratic Party*?

2. Whether an injunction against the participation in a National Political Party Convention, and in other National Party affairs, of persons seated in said Convention by its Credentials Committee, and by vote of the delegates to the Convention, violates the Constitutional rights of free political association of said persons and said National Political Party and its members?

3. Whether state law exclusively governs the selection and seating of delegates to a National Political Party Convention, and participation in other National Party affairs, notwithstanding applicable rules and decisions of the National Political Party?

4. Whether petitioners' right to a fair hearing as guaranteed by the due process and equal protection clauses of the United States Constitution was denied in view of the public statements of the trial judge concerning this case demonstrating a gross bias and prejudice against petitioners?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are Article VI, Section 2 (the Supremacy Clause) and the First and Fourteenth Amendments.

STATEMENT OF THE CASE.

Respondents are those persons who were elected as delegates to the 1972 Democratic National Convention from the Chicago districts on March 21, 1972. Petitioners are the members of an alternative delegation which the Credentials Committee of the Democratic National Convention, and subsequently the Convention itself, decided should be seated at the Convention in lieu of respondents because of violations by respondents of Rules of the National Democratic Party which, among other things, prohibited closed and secret slatemaking and discrimination by party officials on grounds of race, sex or age.

The challenge against the seating of respondents in the 1972 Democratic National Convention was filed with the Acting Chairman of the Credentials Committee on March 31, 1972. Under the National Democratic Party Rules, the Acting Chairman of the Credentials Committee appointed a Hearing Examiner to hear evidence on the challenge and determine whether National Party Rules had been violated. Cecil F. Poole, former United States Attorney for the Northern District of California, was appointed Hearing Examiner on the Chicago challenge.* Examiner Poole held hearings in Chicago on May 31, June 1 and June 8, 1972. Both sides were represented by counsel and oral and documentary evidence was received. The proceedings were reported by certified court reporters resulting in a transcript approximating 2,000 pages. More than 500 exhibits, including affidavits and other documents, were introduced.

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* Initially Mr. Louis Oberdorfer, a member of the bar of the District of Columbia, was appointed Hearing Examiner; however, Mr. Oberdorfer declined to serve after allegations were made by respondents at a pre-hearing conference that he had a conflict of interest with respect to the contest.

The Examiner's Report on the challenge against respondents is included as Appendix C hereto. The Examiner found:

> ". . . [T]he challenged slate of delegates [respondents] was selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago . . . to the exclusion of other candidates not favored by the organization and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate." (at p. C-2)
>
> "[T]here was a clear concert of act and deed among officials of the regular party organization in Chicago . . . to accomplish the private selection of delegates, thereafter to put the full weight, authority, prestige and support of the organization behind the candidacies of those thus chosen, and to discourage and render ineffective efforts by those outside the penumbra of the party's influence." (at p. C-3)
>
> "[T]he violations of [the Rules] were deliberate, covert and calculated." (at p. C-3)

With regard to participation by racial minorities, women and young people, the Examiner expressly rejected any interpretation of the National Party Rules as involving a "quota" system, stating that "any such principle would be encumbered by grave doubt in any case." (at p. C-4) The Examiner found that "the Party [in Chicago] has failed in its basic obligation to open up to fuller participation by those who have been excluded" (at p. C-4) and that "the selectivity [in slatemaking] which so heavily favored entrenched office holders and regulars was also operative in the choosing of women, the young and racial minorities, and that it discriminated against them invidiously and substantially." (at p. C-21)

On Friday, June 30, 1972, the Credentials Committee of the 1972 National Convention (consisting of representatives of each state delegation), after hearing argument on the contest, voted to sustain the Examiner's Report and to seat petitioners as the delegates from the Chicago districts in light of respondents' "deliberate, covert and calculated" violations of National Party Rules. The 1972 Democratic National Convention, at its opening session on Monday, July 10, 1972, upheld the decision of the Credentials Committee.

Respondents' Federal Court Action and This Court's Decision of July 7, 1972

On Monday, July 3, 1972, following the decision of the Credentials Committee, respondents petitioned the Federal District Court for the District of Columbia to reverse the Credentials Committee's decision and to order the National Democratic Party and the National Convention to seat respondents, and not petitioners, as the Chicago delegates.*

The District Court dismissed respondents' action on July 3, 1972. The District Court's decision was sustained by the Court of Appeals for the District of Columbia Circuit on Wednesday, July 5, 1972. *Keane* v. *National Democratic Party*, 469 F.2d 563 (D.C. Cir. 1972) (included

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* Respondents' complaint (originally filed May 19, 1972) requested of the Federal court among other things:

> "That this Court declare, adjudge and decree that Plaintiff and the Delegates [respondents] have been duly elected in accordance with the provisions of the Illinois Election Code, and that they are, therefore, entitled to take their seats as delegates and alternates to the 1972 Democratic National Convention and to function and participate fully therein without interference by or on behalf of Defendants." Complaint of Thomas E. Keane, et al. for Declaratory and Injunctive Relief, Civ. No. 1010-72 (D.C. Dist. Ct. at p. 13).

as Appendix D hereto). The Court of Appeals noted that "in approving the actions of the Credentials Committee in unseating the Illinois plaintiffs and seating an alternative delegation, we have acknowledged the National Party's right to impose requirements on the delegate selection process separate from and in addition to those imposed by state law." (at p. D-20) The Court of Appeals further stated that:

> "The right of a national political party to determine the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated state law in addition to a valid party regulation. To hold otherwise would severely limit the freedom of association of the party itself." (at p. D-17)

Advised by counsel for petitioners at oral argument that even if respondents were unsuccessful in their Federal court action, they would seek to proceed in an Illinois state court to enjoin petitioners from participating in the National Convention on the ground that only the delegates elected under Illinois law could be seated, the Court of Appeals, having expressly rejected that claim, enjoined respondents "from taking action in any other court that would impair the effectiveness and integrity of the judgments of this Court." (at p. D-24) At the same time, in a companion case instituted by the delegates elected under California law who had been denied a portion of their Convention seats by the Credentials Committee, the Court of Appeals reversed the decision of the Credentials Committee on the ground that the Credentials Committee's decision on the California challenge was not made in accordance with applicable National Party Rules and violated the due process clause of the Fourteenth Amendment. (at pp. D-2—D-13)

The National Democratic Party (seeking to uphold the 1972 National Convention's right to freely decide the contests) and respondents then sought relief from this Court. On the evening of Friday, July 7, 1972, at a special session, this Court stayed the judgments of the Court of Appeals in both cases, stating that it did so in order to permit the decisions on both the Illinois and California contests to be made by the 1972 Convention. This Court's *per curiam* opinion noted that:

> "The particular actions of the Credentials Committee on which the Court of Appeals ruled are recommendations that have yet to be submitted to the National Convention of the Democratic Party. Absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee." (at pp. A-2-A-3)

This Court emphasized the historical right of the national party conventions to decide credentials contests:

> "Judicial intervention in this area traditionally has been approached with great caution and restraint. See *Irish* v. *Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119 (CA 8 1968), affirming 287 F. Supp. 794 (D.C. Minn. 1968), and cases cited; *Lynch* v. *Torquato*, 343 F.2d 370 (CA 3 1965); *Smith* v. *State Exec. Comm. of Dem. Party of Ga.*, 288 F. Supp. 371 (ND Ga. 1968). Cf. *Ray* v. *Blair*, 343 U.S. 214 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." (at p. A-4)

This Court concluded:

> "In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from

> the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political processes to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed." (at p. A-5)

This Court's stay order had the effect of preventing enforcement of the California decision of the Court of Appeals against the 1972 Convention (enforcement of which would, as this Court noted, have "denie[d] to the Democratic National Convention its traditional power to pass on the credentials of the California delegates"). But nothing in this Court's opinion suggested that it intended its stay order to permit relitigation of the issues in another judicial forum. On the contrary, this Court expressly stated that it was acting to permit the political process of the Convention to function free from judicial supervision. This Court stated:

> "We recognize that a stay of the Court of Appeals judgments may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee. But, for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (at p. A-5)

The Court of Appeals' Decision of February 16, 1973

Subsequent to the Convention, on October 10, 1972, this Court (on motion of the National Democratic Party) vacated the judgment below and remanded *Keane* v. *National Democratic Party* to the Court of Appeals for the District of Columbia for a determination as to whether the case had become moot. *Keane* v. *National Democratic Party*, 409 U.S. 816 (1972). On February 16, 1973, the Court of

Appeals held (in an opinion included as Appendix E hereto) that the case was moot insofar as it involved respondents' complaint against the seating of petitioners in the National Convention, stating: "In the period intervening since the action of the District Court [July 3, 1972] the 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation [petitioners] whose right thereto was contested by Plaintiffs Keane, et al. in the District Court" (at p. E-2). Thus, the Court of Appeals expressly acknowledged and held, on remand from this Court, that, under the July 7 decision of this Court, the 1972 National Convention had the right to decide the Chicago credentials contest and to seat petitioners as the Chicago delegation. The Court of Appeals expressly reaffirmed the District Court's previous dismissal of respondents' action. (at p. E-2)* The Court of Appeals was asked by petitioners to enjoin any further proceedings by respondents against petitioners in the Illinois courts, but the Court of Appeals declined to do so stating it was of the opinion that "no exceptional circumstances appear to justify now the relief requested." (at p. E-3)**

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* On February 22, 1973, respondents moved to have the Court of Appeals revise its opinion and vacate the judgment of the District Court arguing that "the Court erred in affirming the judgment of the District Court." The Court of Appeals denied respondents' motion.

**It may be noted that the National Democratic Party urged the Court of Appeals that direct appeal through the Illinois courts, rather than a collateral Federal injunction, provided petitioners an appropriate avenue of relief from the Illinois injunction orders. See also *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972) (Mr. Justice Rehnquist, in Chambers) (at p. H-7).

Respondents' State Court Action and the Injunctive Orders Appealed From Herein

Respondents instituted the state court action which is the subject of this petition on April 19, 1972, requesting the Circuit Court of Cook County to enjoin prosecution of the challenge by petitioners on the ground that respondents, and no other persons, could lawfully participate in the National Convention as delegates from the Chicago districts. On April 20, 1972, petitioners filed a petition for removal of the action to the Federal District Court for the Northern District of Illinois on the ground that respondents' assertion of the supremacy of state law in the selection of National Convention delegates was properly characterized as a claim under Federal law. On May 17, 1972, the Federal District Court remanded the case to the state court on the ground that the Constitutional issues arose only in defense and therefore did not support removal. *Wigoda* v. *Cousins*, 342 F. Supp. 82 (N.D. Ill.) *aff'd per curiam* (7th Cir. 1972) (included as Appendix F hereto). In remanding the case, the District Judge Hubert L. Will noted:

> "This is not to suggest that the qualifications and eligibility of delegates to national political party conventions is properly determinable by state law or by state courts. If it were, each of the fifty states could establish qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result. *The proper forum for determination of the eligibility of delegates to serve at such a convention is the Credentials Committee of the party or the convention.*" [emphasis added] (at p. F-6)

Despite the remand of the case, action in the state court was delayed as a result of intervening Federal proceedings, including a Federal injunctive action instituted by petitioners under 42 U.S.C. § 1983,* and thus none of the actions of the Illinois court which are the subject of this petition occurred until after this Court's decision of July 7, 1972 in the Washington, D.C. Federal court action commenced by respondents in an effort to reverse the decision of the Credentials Committee.

On Saturday, July 8, 1972, following the decision of this Court on July 7, 1972, respondents sought and obtained from the Circuit Court of Cook County the injunctive order purporting to bar petitioners from participating in the 1972 Convention. (The July 8 order of the Circuit

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* On May 25, 1972, Federal District Judge Frank J. McGarr granted a temporary restraining order (and subsequently a preliminary injunction) against prosecution by respondents of their state court action for an injunction against petitioners' participation in the political process of the National Democratic Party. *Cousins* v. *Wigoda*, Civil No. 72 C 1108 (N.D. Ill. May 25, 1972, June 9, 1972). On June 29, 1972 the Court of Appeals for the Seventh Circuit (in a 2-to-1 decision) reversed the lower court injunction, citing principles of Federal-state comity. *Cousins* v. *Wigoda*, 463 F.2d 602 (7th Cir. 1972) (included as Appendix G hereto). On July 1, 1972, Mr. Justice Rehnquist denied a petition for a stay of the order of the Seventh Circuit. *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972) (included as Appendix H hereto). Immediately following the decision of the Seventh Circuit on June 29, 1972, the Circuit Court of Cook County did issue an *ex parte* temporary restraining order which purported to bar the submission of names of an alternative delegation to the Credentials Committee; however, that order subsequently expired by its terms and was not the subject of any further proceedings. On Wednesday, July 5, 1972, advised of the decision of the Court of Appeals for the District of Columbia Circuit that morning (see pp. 7-8 *supra*), the Circuit Court of Cook County indefinitely stayed further proceedings in the state court action and there were no further proceedings in the state court until July 8, 1972, after this Court's decision of July 7, 1972.

Court of Cook County is included as Appendix I hereto.) The July 7 decision of this Court was presented to the trial judge and attorneys for petitioners argued that this Court's decision was controlling as to the issues in the case and barred judicial interference with the proceedings of the 1972 Democratic National Convention. Petitioners further argued that any injunction would violate Constitutional rights of petitioners and the National Democratic Party. The trial judge stated that he had read the opinion of this Court, but nevertheless on the evening of Saturday, July 8, 1972 issued the initial injunction appealed from herein.

Post-Convention Actions of the Circuit Court of Cook County

Under the Rules of the National Democratic Party adopted at the 1972 Convention, the delegates seated at the Convention were entitled to choose the new Illinois members of the Democratic National Committee to serve until the 1976 National Convention, and a caucus of the Illinois delegation was scheduled to be held in Chicago for this purpose on August 5, 1972, several weeks after the Convention. On August 2, 1972, the Circuit Court of Cook County, as supplemental relief in this action, issued an order barring petitioners from participating in that caucus, although petitioners had been seated as the Chicago delegates by the 1972 Convention.* (The August 2, 1972

*At that time petitioners and the National Democratic Party sought emergency injunctive relief against the Illinois state court proceedings from the Court of Appeals for the District of Columbia Circuit; however, that court declined to intervene stating that it was "not an appropriate forum" for such proceedings. *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir. August 3, 1972). Petitioners also unsuccessfully sought emergency relief from the Supreme Court of Illinois.

order of the Circuit Court of Cook County, which is also appealed from herein, is included as Appendix J hereto.) As a result of the Circuit Court's order, respondents, and not petitioners, participated in the August 5 caucus. Petitioners immediately filed with the Democratic National Committee notice of intent to challenge the results of the August 5 caucus under National Party Rules and to call a new caucus to choose members of the Democratic National Committee in accordance with the Rules at such time as the order barring petitioners from exercising their rights as delegates granted by the 1972 Convention should be vacated on appeal.

Subsequent to the Convention, the Circuit Court of Cook County, on motion of respondents, has caused to be served on 62 of the petitioners rules to show cause why they should not be held in contempt for participation in the Democratic National Convention in violation of the July 8, 1972 injunction of the Circuit Court of Cook County. Criminal trials for contempt have been deferred by the Circuit Court of Cook County conditioned on rapid prosecution by petitioners of this appeal, with bi-monthly status calls. In response to motions by petitioners, the trial judge has stated that jail sentences imposed will not exceed six months and that, therefore, petitioners have no right to trial by jury. Attorneys for respondents have submitted an extensive list of witnesses to be called to testify at the criminal trials and the trial judge has stated that the trials may be lengthy.

Public Statements by the Trial Court Judge

Subsequent to the issuance of the July 8, 1972 order and while the 1972 Convention was in progress, various newspapers reported *ex parte* interviews with the trial court judge, Daniel A. Covelli, with respect to the Chicago

challenge. His statements display the judge's bias against petitioners in this case. Judge Covelli was quoted as advising respondents to seek to have his order enforced through proceedings in the Florida state courts as follows:

> "If I were Daley's lawyers I would file contempt papers down in Dade County (Florida) because that state should honor and enforce the orders of any other state." (*Chicago Daily News*, July 11, 1972 at p. 6)

Judge Covelli was further quoted in reference to the contest comparing the situation to that of Nazi Germany:

> "I'll tell you this: If McGovern is elected, it's going to be another Nazi Germany. Remember when Hitler took over and all the young guys were behind him . . . and you know what he did to Germany." (*Chicago Daily News*, July 11, 1972 at p. 6)

Judge Covelli has conceded that he discussed the case with newspaper reporters outside the presence of the parties and he has not denied making the quoted statements. Transcript of July 20, 1972 at pp. 24-27.

Subsequent to the Convention, petitioners moved that Judge Covelli vacate his July 8 order and disqualify himself from any further proceedings in the case on the ground that his statements indicated a patent bias, preventing petitioners from obtaining a fair hearing and a fair trial. Judge Covelli denied the motion and has continued to act in the case, issuing the supplemental order of August 2, 1972 and instituting criminal contempt proceedings against petitioners for alleged violation of the order of July 8, 1972.

The Decision of the Illinois Appellate Court

On September 12, 1973, the Illinois Appellate Court (First District) upheld the July 8 and August 2 orders of the Circuit Court of Cook County. In rejecting petitioners' contentions, the Appellate Court asserted that "the law of the state is supreme and party rules to the contrary are of no effect" (at pp. B-24-B-25) and held that:

> "The right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois election code." (at p. B-21)

The Appellate Court further stated:

> "Once the delegates were chosen in a free, open and non-discriminatory primary election, it became the legal duty of the party to carry out the mandate of the electorate. *Once elected, any question of the delegates' qualifications to hold office is beyond the authority of party functionaries; it is a legal right properly protected by the courts.*" (at p. B-26) [emphasis added]

The Appellate Court concluded:

> "We think the Convention, a voluntary association, was without power or authority to deny the elected delegates their seats in the Convention and most certainly could not seat people of their choice and force them upon the people of Illinois as their representatives, contrary to their elective mandate. Such action is an absolute destruction of the democratic process of this nation and cannot be tolerated." (at pp. B-31-B-32)

As noted earlier, on November 29, 1973, the Supreme Court of Illinois denied petitioners' motion for leave to appeal the decision of the Illinois Appellate Court. Respondents, in opposing petitioners' motion for review of

the Appellate Court decision by the Illinois Supreme Court, stated:

> "If there is to be further review, let petitioners seek it from the Supreme Court of the United States. It is upon that Court that petitioners seem to rely anyway. It is not consonant with the best interests of the administration of justice that this Court now be asked to decide what the Supreme Court of the United States has said. If the Appellate Court has made an erroneous determination, the Supreme Court of the United States is the best place for petitioners to go to seek further relief." (Answer to Petition For Leave to Appeal in Illinois Supreme Court, November, 1973, at p. 5)

REASONS FOR GRANTING THE WRIT

I.

THE JUDGMENT BELOW IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN KEANE V. NATIONAL DEMOCRATIC PARTY AND INVOLVES FEDERAL CONSTITUTIONAL ISSUES OF FUNDAMENTAL IMPORTANCE TO THE FUNCTIONING OF THE POLITICAL PROCESS IN THE UNITED STATES.

The judgment below upholding the injunctive orders of the Circuit Court of Cook County on the ground that the 1972 Democratic National Convention "was without power or authority" to deny respondents seats in the Convention, and that power to bar the seating of petitioners in the Convention was in fact vested in the Circuit Court of Cook County, represents an assertion of judicial power and state law over the processes of national political parties and their presidential nominating conventions which, if valid, is of enormous significance for the functioning of the American political system.

The fact that the 1972 Democratic National Convention is long over has not made the case moot, deprived the judgment below of continuing effect or lessened the national significance of questions presented. The validity of the judgment below is, of course, of critical continuing importance to petitioners since, unless the judgment is reversed, the Circuit Court of Cook County will go forward with its actions to punish petitioners for participation in the 1972 Democratic National Convention. The effort, expense and injury to reputation involved in the Cook County contempt proceedings to date has already constituted a substantial penalty upon petitioners' exercise of their rights to participate in the political process

in accordance, petitioners submit, with the express decision of this Court that the 1972 Democratic National Convention had the right to decide the Chicago contest. Further, unless the judgment below is reversed, petitioners will continue to be barred by the Circuit Court's supplemental order of August 2, 1972 from exercising their right as seated delegates to participate in the selection of Democratic National Committee members from Illinois to serve until the 1976 National Convention.

Moreover, as this Court emphasized in *Keane* v. *National Democratic Party,* the "novel questions of importance" raised by this litigation are of vital significance not only to the immediate litigants but "to the political system under which national political parties nominate candidates for office and vote on their policies and programs." (at p. A-2) Contests over the seating of delegates have been a recurring feature of national presidential nominating conventions. As this Court stated, "it has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." (at p. A-4) If the contrary decision of the Illinois Appellate Court is correct—that the question of whether to seat respondents was "beyond the authority of party functionaries" (at p. B-26) and that respondents had "a legal right [to be seated] properly protected by the courts" (at p. B-26)—then that decision represents a major limitation on what have historically been viewed as the Constitutional rights of free political association of a national political party and its members. That decision has immediate and direct consequences for the activities of the national political parties as they promulgate rules and standards to govern delegate selection at future national conventions. The decision of the Illinois Appellate

Court that "the law of the state is supreme and party rules to the contrary are of no effect" (at pp. B-24-B-25) means that any power in the national party to enforce and apply its own rules and standards is substantially eliminated. The effect of the Appellate Court decision, if valid, is that resort in virtually all contests at future national conventions will be to the state courts, denying to the national party conventions the historical right (specifically upheld by this Court in *Keane* v. *National Democratic Party*) under which "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (at p. A-5)

A. THE JUDGMENT BELOW IS DIRECTLY CONTRARY TO THE DECISION OF THIS COURT IN KEANE V. NATIONAL DEMOCRATIC PARTY WHICH ESTABLISHED THE RIGHT OF THE 1972 DEMOCRATIC NATIONAL CONVENTION TO DECIDE THE CHICAGO CREDENTIALS CONTEST.

The July 7, 1972 decision of this Court established the right of the 1972 Democratic National Convention—and not the courts—to decide both the Chicago and California credentials contests. This Court's *per curiam* opinion, citing "the large public interest in allowing the political processes to function free from judicial supervision," (at p. A-5) was explicit and unambiguous in this regard. Having chosen to seek to reverse the Credentials Committee's decision on the Chicago contest by legal action in the Federal courts in Washington, D.C., and having lost in the District Court, the Court of Appeals and finally, at a rare special session, in the Supreme Court of the United States, respondents clearly were not entitled to proceed to relitigate the issues in the case in an Illinois state court in an effort to obtain a different result. Under the supremacy clause of the United States Constitution, once this Court

decided the issue, the Circuit Court of Cook County had no power to issue an injunctive order contrary to this Court's decision.

The opinion of the Illinois Appellate Court upholding the Circuit Court of Cook County offers no basis for the Circuit Court's actions in the face of this Court's July 7 decision. Indeed, the sole discussion in the Illinois Appellate Court opinion of the explicit language of this Court's *per curiam* decision of July 7 consists of the following:

> "[T]he defendants contend the judgment of the Supreme Court staying the injunction of the Court of Appeals was intended solely to permit a determination of the issues to be made by the Democratic National Convention 'free from judicial intervention.' (*Keane* v. *The National Democratic Party,* (1972) 469 F.2d 563, judgment stayed, ... U.S. ....., 34 L. Ed. 2d 1.) The opinion does not say 'free from judicial intervention,' but says 'absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee."[*] The court was discussing the Federal Courts and does not mention State laws, election of delegates or their rights, or the jurisdiction of State courts over their delegates. It must be recognized that the Circuit Court of Illinois was not intervening in the Convention, but only exercised its jurisdiction over the Illinois delegates and challengers under the Illinois Election Code." (at pp. B-12-B-13)

The Illinois Appellate Court's attempt to distinguish this Court's decision is invalid on its face. The Appellate Court states that "the Circuit Court of Illinois was not intervening in the Convention, but only exercised its juris-

* The Appellate Court's characterization of this Court's opinion wholly ignores, among other things, this Court's express reference to permitting the political processes to function "free from judicial supervision." (at p. A-5)

diction over the Illinois delegates and challengers under the Illinois Election Code." (at p. B-13) This is a distinction without a difference. The Illinois injunction against participation by petitioners in the National Convention was plainly "intervening in the Convention". Indeed that was its only and express purpose. If the purpose of the state court injunction had been effected, the 1972 Democratic National Convention would have been forced to seat respondents (or possibly to seat no delegates from Chicago). In view of the closeness of the Convention votes, it is entirely conceivable that the injunction could have affected the outcome of the Convention.* Moreover, the Circuit Court of Cook County has subsequently proceeded with contempt actions to punish petitioners for participation in the Convention. Such actions directly contravene the right of the Convention "to accept or reject, or accept with modification, the proposals of its Credentials Committee" which this Court upheld in its July 7 decision.

The decision of the Illinois Appellate Court that "the Convention, a voluntary association, was without power or authority to deny the elected delegates their seats" (at p. B-31) is directly contrary to this Court's decision

* If the Illinois court were correct, a California state court could similarly, on the eve of the 1972 Democratic National Convention, have dictated the outcome of the California credentials contest and the state courts of the 49 other states would have comparable jurisdiction, with the effect that the outcome of the national presidential nominating conventions of both political parties would frequently be determined by state court decisions. Prior to the 1952 Republican National Convention, for example, a state trial court in Georgia issued a last-minute decision regarding which of the two competing Georgia delegations was entitled to be seated at that Convention which, if the 1952 Republican Convention had been bound to follow it, might well have affected the Convention's outcome. See 1952 Republican National Convention Proceedings at pages 164-195.

that the 1972 National Convention could deny seats to the elected delegates from both California and Illinois in accordance with the historical understanding "since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." (at p. A-4)

There is also no basis for the suggestion of the Illinois Appellate Court that this Court's decision of July 7 was not concerned with "state laws, election of delegates or their rights" and that this Court's decision operated only to free the processes of the national party from Federal and not state court intervention. (at p. B-12) In both the Chicago and California cases, this Court was directly concerned with delegates elected in accordance with state law and this Court clearly upheld the right of the 1972 National Convention, in the circumstances of the two cases, to refuse to seat such delegates. While some of the specific references in this Court's opinion of July 7 are to Federal courts, all of the principal grounds stated by this Court in its opinion apply by their terms to the prospect of state as well as Federal court action.

"[T]he large public interest in allowing the political processes to function free from judicial supervision," to which the July 7 opinion of this Court refers (at p. A-5), is as applicable to the Circuit Court of Cook County as it is to the Supreme Court of the United States. The same is true of the emphasis throughout this Court's opinion on the historical freedom under which "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (at p. A-4) The "vital rights of association guaranteed by the Constitution" to which this Court refers (at p. A-5) are equally threatened by state court action. Even more applicable to the actions

of the Illinois court—since it acted on the night following this Court's decision—was this Court's emphasis upon the inadequate time available for judicial consideration of the issues on the merits, which consequently warranted judicial abstention and permitting the political process to go forward freely under the circumstances (at p. A-3).

Even if one were to ignore the explicit language of this Court's opinion of July 7, under unambiguous Federal law established by prior decisions of this Court, this Court's action in staying (but not at that time vacating) the July 5 judgment of the Court of Appeals did not alter the binding and res judicata effect of that judgment (which, as noted earlier, was explicitly adverse to respondents' state court claim) or permit collateral attack in the Illinois courts. "The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel . . . *this is true even if the appeal is taken with a stay or supersedeas; these suspend execution of the judgment but not its conclusiveness in other proceedings.*" 1B Moore's Federal Practice ¶ 0.416[3] at 2252-53 [emphasis added]. See, *e.g., Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941). Nothing in the *per curiam* opinion of this Court staying the judgments of the Court of Appeals suggested any intention to permit relitigation of the issues in an Illinois court. On the contrary, this Court's opinion expressly stated that its action was intended to permit the National Convention to exercise its historical right to resolve controversies over the seating of National Convention delegates. It was during the period that the stayed judgment of the Court of Appeals was outstanding and unvacated that the Circuit Court of Cook County entered its orders purporting to bar conduct which the Court of Appeals had expressly authorized. The actions of the 1972 National Convention and of petitioners

during this period were taken under the explicit protective umbrella of that judgment, as well as the opinion of this Court.*

In proceedings before the Court of Appeals for the District of Columbia on remand from this Court, counsel for the National Democratic Party, which was also a party to

* This Court vacated and remanded the judgment of the Court of Appeals on October 10, 1972 only *after* the 1972 Democratic National Convention and *after* the orders which petitioners herein are seeking to have reversed were entered. The Illinois Appellate Court ignored the established law that this Court's stay order left the Court of Appeals' judgment outstanding and therefore res judicata during the time of the National Convention and the various actions of the Circuit Court of Cook County. The Appellate Court held, citing no authority, that the effect of this Court's stay and subsequent vacating of the Court of Appeals' decision was to render "said order non-existent and a nullity, as if it never existed." (at B-13)

As a further reason why the judgment of the Court of Appeals (which had been stayed but not vacated) was not entitled to res judicata effect in the Circuit Court of Cook County, the Illinois Appellate Court stated that it "finds a near total lack of identity as to either issues or parties." (at p. B-14) In fact, however, the Court of Appeals (which went so far as to enjoin the state court proceedings) expressly noted in its decision that "all interested parties [were] represented in the Federal forum" (at p. D-23) (plaintiffs in the two actions were the same and the ten original challengers were defendants in both actions) and that it had adjudicated the issues involved in the state court action. (at pp. D-17, D-20-D-21)

The Illinois Appellate Court also stated that petitioners failed "to preserve their argument, based on the res judicata effect of the decision of the United States Court of Appeals for the District of Columbia in the record." (at p. B-15) In fact, however, the record clearly shows that the July 5 judgment of the Court of Appeals, as well as the July 7 decision of this Court, were both presented to the trial court judge; and both opinions appear as exhibits in the record of the trial court proceeding. (Report of Proceedings of July 8, 1972 at pp. 29-30 and related exhibits).

the Federal proceedings, described the injunctive order issued by the Circuit Court of Cook County purporting to bar petitioners from participating in the 1972 National Convention as "transparently invalid" in light of this Court's prior decision.* The Court of Appeals for the District of Columbia, fully advised as to all of the proceedings in this case, explicitly held on February 16, 1973 that, under the July 7 decision of this Court, the 1972 National Convention "acting within its competence" seated petitioners in the National Convention, and the Court of Appeals reaffirmed the dismissal of respondents' complaint against the seating of petitioners. (at pp. E-2-E-3)** The Court of Appeals denied petitioners' request for an injunction against the Illinois proceedings not because of any disagreement on the merits (on which it expressly upheld petitioners' position) but because of reluctance in the absence of "extraordinary circumstances" to enjoin a pending case in a state court.

This Court's decision of July 7, 1972 was issued at a time of great urgency. The decision was issued on Friday

* Counsel for the National Democratic Party also stated:
"At every stage of this litigation, the National Democratic Party has taken the position that under the Constitution no courts—state or federal—may interfere in the internal affairs of a national political party, except possibly in exceptional circumstances not present in this case. That position was adopted, on at least a preliminary basis, by the Supreme Court in its ruling in this case." Response of Joseph A. Califano, Jr., et al., Counsel for National Democratic Party and Democratic National Committee in *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir. November 27, 1972 at p. 1).

** See also *Republican State Central Committee of Arizona* v. *The Ripon Society Inc.*, 409 U.S. 1222 (1972) (opinion of Mr. Justice Rehnquist on application for stay) (citing *O'Brien* v. *Brown* in granting a stay of a lower court injunction which would have limited in some respects the freedom of the 1972 Republican National Convention).

evening; the Democratic National Convention was to convene the following Monday. This Court, sitting in a rare special session, determined to allow the political process to go forward freely, stating that "absent judicial intervention, the Convention could decide to accept or reject, or accept with modifications, the proposals of its Credentials Committee" and noting that its decision "may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee." (at p. A-5) There is not one word in this Court's opinion which supports respondents' contention, upheld by the Illinois Appellate Court, that this Court somehow intended to allow relitigation of the issues in a state court with a result directly contrary to that which this Court had reached.

Petitioners submit that it was and remains clear that this Court intended to end this litigation, recognizing—at least in the circumstances of this case—that "the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." (at p. A-4) The Illinois courts have refused to follow this Court's decision.

B. THE JUDGMENT BELOW INVOLVES FEDERAL CONSTITUTIONAL ISSUES OF FUNDAMENTAL IMPORTANCE TO THE FUNCTIONING OF THE POLITICAL PROCESS.

There is no precedent for the proposition of the Illinois Appellate Court that questions of the seating of national convention delegates are "beyond the authority of party functionaries" and that a national political party convention is "without power or authority" to refuse to seat delegates chosen in accordance with state law. The Appellate Court's decision is directly contrary to the February 16, 1973 decision of the Court of Appeals for the District of Columbia Circuit that "the 1972 Convention of

the National Democratic Party, acting within its competence, seated at the Convention the delegation [petitioners] whose right thereto was contested by plaintiffs Keane et al. [respondents]." (at p. E-2) As Judge Hubert Will's memorandum opinion states, if the claim that state courts have jurisdiction over such controversies were accepted, "each of the 50 states could establish the qualifications of its delegates to various party conventions without regard to party policy, an obviously intolerable result." (at p. F-6) Similarly, there is no precedent for a court injunction such as the supplemental injunction issued by the Circuit Court of Cook County on August 2, 1972 against persons participating in the continuing processes of a national political party.

This Court accurately stated in its opinion in *Keane* v. *National Democratic Party* that "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (at p. A-5) The authorities cited by the Illinois Appellate Court in support of its decision that respondents had "a legal right [to be seated] properly protected by the courts" do not, in fact, support judicial intervention into the process of a national political party convention.* The Illinois Appellate Court purports

* For example, *State ex rel. Cook* v. *Houser*, 122 Wis. 534, 100 N.W. 964 (1904), cited at length by the Illinois Appellate Court (at pp. B-23-B-24), expressly stated:

> "[W]hether the National Republican Convention decided right or wrong, for itself, in determining which of the sets of delegates applying for seats in such Convention as the regular Republican delegates from this state, were entitled to be recognized as such, *we [the court] have nothing whatever to do.*" 100 N.W. at p. 983.

None of the other cases cited by the Appellate Court even concerns the relationship of state laws to a National Party Convention. The other cases all involve regulation by state law and state courts of internal state political party affairs.

to find authority for its actions in various past decisions of this Court. (at pp. B-26-B-31) Yet this Court itself expressly and accurately stated in *Keane* v. *National Democratic Party* that "no holding of this Court up to now gives support for judicial intervention in the circumstances presented here involving as they do relationships of great delicacy and essentially political nature." (at p. A-4)

There are repeated instances in which the national party conventions of both political parties have refused to seat delegates chosen in accordance with state law (whether by committee, convention or primary election) and have seated delegates chosen by alternative processes. See generally Leventhal, "The Law of National Party Conventions," *The New York Law Journal* (Aug. 25, 1964); R. Bain, *Convention Decisions and Voting Records* (Brookings 1960). In 1968 alone, the Democratic National Convention in Chicago refused to seat the entire delegation chosen in accordance with Mississippi law and seated instead delegates chosen by an alternative caucus procedure conducted by the challengers; the Convention deprived the delegates chosen in accordance with Georgia law of one-half their seats and gave the seats to delegates chosen at a convention conducted by the challengers; and the Convention refused to seat delegates elected in accordance with Alabama law (unless they were willing to take a "loyalty oath") and, to replace them, seated members of a challenging slate chosen by an ad hoc process. See Schmidt and Whalen, *Credentials Contests at the 1968 - and 1972 - Democratic National Conventions*, 82 *Harvard Law Review* 1438 (1969).

The Rules of the National Republican Party expressly impose an obligation upon all party members to comply

with National Party Rules regardless of state laws (see Report of the Committee of Rules and Order of Business, 1968 Republican National Convention Proceedings at 10-14) and the Republican Convention has acted to enforce this obligation. See, *e.g.*, 1912 Republican National Convention Proceedings at pp. 202-12. Prior to the 1952 Republican National Convention, a state trial court in Georgia had issued a last-minute decision regarding which of two contesting Georgia delegations was entitled to be recognized, but the Republican National Convention rejected that decision and seated the contesting delegation on the basis that "this National Convention is absolutely the last authority, the supreme court in deciding who shall have credentials to this Convention, and it shall not be dictated to by the state court of Georgia or by any other court." (Remarks of Delegate Gordon X. Richmond of California, 1952 Republican National Convention Proceedings at p. 168).*

* Governor Alfred E. Driscoll of New Jersey stated in that debate:

> "This Convention is the sole judge of the qualifications of its own members . . . [T]he decision of a lower court in Georgia is not binding upon Republican tribunals nor can its decision be dispositive of the issues before this great Convention.
>
> "I have a healthy respect for the American judicial system. I have also a healthy respect for the judicial system of Georgia. But I submit to you that this is the supreme court of Republicanism and is the proper tribunal before which the issues raised by the contest must be settled.
>
> "[W]e have no right to allow our jurisdiction to be limited, for to do so would be to tie our hands and perhaps permit all kinds of judicial decisions to prevent us carrying on our business.
>
> "We and we alone are the sole judges of the qualifications of our members." 1952 Republican National Convention Proceedings at p. 169

If the Illinois Appellate Court is correct that "the law of the state is supreme and party rules to the contrary are of no effect," (at pp. B-24-B-25) then it is difficult to exaggerate the significance of that holding for the functioning of our political system. "Vital rights of association guaranteed by the Constitution" to which this Court referred in *Keane* v. *National Democratic Party* (at p. A-5) would be subject to a radical limitation. In the Chicago case in 1972, for example, counsel for the National Democratic Party emphasized that it would have been "a violation of the First Amendment rights of all Democrats to permit Illinois to foist on the party's national convention—its highest governing body—a delegation selected in gross violation of some of the most fundamental principles of the party." Memorandum of National Democratic Party in Opposition to Petition for Certiorari (July 6, 1972, at p. 14) The processes in which both National Political Parties continually engage of drafting and promulgating rules and principles to govern their National Conventions would be, to a very substantial degree, moot and irrelevant, and credentials contests at future National Conventions would be decided not by internal party processes but by the courts.

This Court stated in *Keane* v. *National Democratic Party* that the petitions for certiorari presented "novel questions of importance to the immediate litigants and to the political system under which national political parties nominate candidates for office and vote on their policies and programs." (Appendix A at p. A-2) These important questions continue to be involved in this litigation and certiorari should therefore be granted by this Court either to reverse summarily the judgment below on the basis of *Keane* v. *National Democratic Party* or to review the fundamental Constitutional issues involved in this case.

II.

THE JUDGMENT BELOW REFUSING TO REVERSE THE ORDERS APPEALED FROM BECAUSE THE TRIAL JUDGE HAD SHOWN BIAS AGAINST PETITIONERS IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The trial judge below publicly advised respondents to enforce his injunctive orders in a Florida state court and compared the situation to Nazi Germany. The comments are quoted at pages 15 to 16, *supra*.

The Illinois Appellate Court below, basing its decision upon (1) a party's right to only one change of venue under the Illinois Venue Act and (2) the fact that the trial judge made his statements only after issuing his original order, refused to vacate the trial court's orders on this ground. (at pp. B-33-B-34) However, the relief sought was not grounded upon any statutory right to a change of venue but upon the constitutional guarantee of a trial before "an unbiased judge." This right is essential to due process. *Holt* v. *Virginia*, 381 U.S. 131, 136 (1964). *Cf. Irvin* v. *Down*, 366 U.S. 717, 722 (1961); *Tumey* v. *Ohio*, 273 U.S. 510, 522 (1926). It is axiomatic that "trial before 'an unbiased judge' is essential to due process." *Johnson* v. *Mississippi*, 403 U.S. 212, 216 (1971). The fact that the trial judge's statements were made after his original order was issued does not alter the demonstration of bias they represent. Further, the statements were made prior to the trial judge's supplemental order of August 2, 1972.

This Court's previous decisions have held that petitioners had a right to a hearing before an impartial judge, which they did not receive. Certiorari should be granted, if for no other reason, so that this Court may review the decision below on this fundamental Constitutional issue.

CONCLUSION

Petitioners pray that this Court issue its writ of certiorari to the Illinois Appellate Court and summarily reverse the judgment of the court below on the authority of *Keane* v. *National Democratic Party* or, in the alternative, review the substantial Federal questions raised therein.

Respectfully submitted,

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